

STATE OF MICHIGAN
COURT OF APPEALS

MARK M. BACHA and KAREN M. BACHA,

Plaintiffs/Counterdefendants-
Appellants,

v

ROSS PROPERTIES, INC.,

Defendant-Appellee,

and

MARK M. CRONMILLER,

Defendant,

and

GOWANIE GOLF CLUB, INC.,

Defendant/Counterplaintiff.

UNPUBLISHED

February 4, 2010

No. 286632

Macomb Circuit Court

LC No. 2006-002763-CZ

Before: Shapiro, P.J., and Jansen and Beckering, JJ.

JANSEN, J. (*concurring in part and dissenting in part*).

I concur with the majority's conclusion that the trial court correctly granted summary disposition of plaintiffs' acquiescence and easement-by-necessity claims. I further concur with the majority's determinations that the trial court did not err by relying on the Axford affidavit and that plaintiffs have failed to establish plain error with respect to the denial of their motion for judicial disqualification. I must respectfully dissent, however, from the majority's conclusion that the trial court erred by granting summary disposition for defendants with respect to plaintiffs' adverse possession and prescriptive easement claims.

Plaintiffs contend that they acquired title to the westerly ½ of Outlot C by way of adverse possession, that title to the westerly ½ of Outlot C should have been quieted accordingly, and that the trial court therefore erred by granting summary disposition in favor of defendants with respect to their adverse possession claim. I cannot agree. "To establish adverse possession, the claimant must show that its possession is actual, visible, open, notorious, exclusive, hostile,

under cover of claim or right, and continuous and uninterrupted for the statutory period of fifteen years.” *West Michigan Dock & Market Corp v Lakelands Investments*, 210 Mich App 505, 511; 534 NW2d 212 (1995). The plaintiff in an adverse possession action must present “clear and cogent” proof of the requisite elements. *Kipka v Fountain*, 198 Mich App 435, 439; 499 NW2d 363 (1993).

In the instant case, plaintiffs’ adverse possession claim depends upon the tacking of their own period of possession to the possessory period of their predecessors in title. See *Connelly v Buckingham*, 136 Mich App 462, 474; 357 NW2d 70 (1984) (observing that “[a]n adverse claimant is permitted to add his predecessor’s period of possession if he can establish privity of estate by mention of the disputed lands in the instrument of conveyance or parol references at the time of the conveyance”). Based on the record evidence presented in this case, I fully acknowledge that the requisite privity of estate existed between plaintiffs and their predecessors in title, the McPhersons, with respect to the westerly ½ of Outlot C.¹

I nonetheless conclude that plaintiffs’ bare ability to tack their own period of possession to that of the McPhersons is of no real significance in the present dispute because the McPhersons’ possession of the westerly ½ of Outlot C was *not* “notorious, exclusive, hostile, under cover of claim or right, and continuous and uninterrupted for the statutory period of fifteen years.” *West Michigan Dock*, 210 Mich App at 511. William McPherson unambiguously testified at his deposition that he and his wife had not owned the westerly ½ of Outlot C. William McPherson acknowledged that when he bought the property in question, he was fully aware that the driveway on the westerly ½ of Outlot C was not part of what he was purchasing. Moreover, he testified that when certain individuals asked him in the mid-1990s whether they could park on the driveway on the westerly ½ of Outlot C, he had told them, “[I]t’s fine with me, it’s not my property any how.” Lastly, McPherson testified that he and his wife had told plaintiffs at the time plaintiffs purchased the property that the driveway on Outlot C “did not belong to us.” Thus, irrespective of whether plaintiffs believed that the McPhersons had owned the westerly ½ of Outlot C, it is clear that the McPhersons, themselves, had at all times known that they did not own it.

When an individual such as William McPherson openly and publicly admits to others that a parcel of land is not his own, it can scarcely be said that he has notoriously and hostilely possessed it under cover of a claim of right. See *id.* In light of William McPherson’s deposition testimony, no reasonable finder of fact could conclude that the McPhersons possessed the westerly ½ of Outlot C in a hostile manner and under a claim of right. See *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

¹ I doubt whether the requisite privity of estate existed between plaintiffs and the McPhersons with respect to the remainder of Outlot C—i.e., that portion of Outlot C not consisting of the concrete driveway. However, this issue is not before us, as plaintiffs have identified and addressed only the westerly ½ of Outlot C in their statement of the questions presented. MCR 7.212(C)(5); *Ypsilanti Fire Marshal v Kircher (On Reconsideration)*, 273 Mich App 496, 553; 730 NW2d 481 (2007).

In short, the McPhersons knew at all times that the westerly ½ of Outlot C was not theirs. They merely used the strip of land with the permission or acquiescence of the true owner. “Peaceable occupation or use by acquiescence or permission of the owner cannot ripen into title by adverse possession, no matter how long maintained. Hostility is of the very essence of adverse possession.” *King v Battle Creek Box Co*, 235 Mich 24, 35; 209 NW 133 (1926). Thus, despite plaintiffs’ ability to tack their period of possession to that of the McPhersons, plaintiffs simply cannot demonstrate that the westerly ½ of Outlot C was used notoriously, hostilely, and under a claim or right for the statutory 15-year period. *West Michigan Dock*, 210 Mich App at 511. Plaintiffs were unable to satisfy their burden of proof on this adverse possession claim as a matter of law. See *Kipka*, 198 Mich App at 441; see also *McQueen v Black*, 168 Mich App 641, 645 n 2; 425 NW2d 203 (1988). Consequently, even viewing the evidence in a light most favorable to plaintiffs, I conclude that the trial court correctly granted summary disposition in favor of defendants with respect to the adverse possession claim.

For similar reasons, I conclude that the trial court properly granted summary disposition for defendants with respect to plaintiffs’ prescriptive easement claim. “An easement by prescription results from use of another’s property that is open, notorious, adverse, and continuous for a period of fifteen years.” *Plymouth Canton Community Crier, Inc v Prose*, 242 Mich App 676, 679; 619 NW2d 725 (2000). The requirements for an easement by prescription are similar to those for adverse possession, with the exception of exclusivity. *West Michigan Dock*, 210 Mich App at 511. This Court has equated the prescriptive-easement element of “adverse” use with the adverse-possession element of “hostile” use. *Goodall v Whitefish Hunting Club*, 208 Mich App 642, 646; 528 NW2d 221 (1995). The burden is on the party claiming a prescriptive easement to show by satisfactory proof that the use of the defendant’s property was of such a character and continued for such a length of time that it ripened into a prescriptive easement. *Plymouth Canton Community Crier*, 242 Mich App at 679. “Mere permissive use of another’s property . . . will not create a prescriptive easement.” *Id.* As with adverse possession, “[a] party may ‘tack’ on the possessory periods of predecessors in interest to achieve [the] fifteen-year period by showing privity of estate.” *Killips v Mannisto*, 244 Mich App 256, 259; 624 NW2d 224 (2001).

Our Supreme Court has explained that “permissive use of a driveway, no matter how long continued, will not result in an easement by prescription.” *Banach v Lawera*, 330 Mich 436, 440-441; 47 NW2d 679 (1951). If such a use was permissive at inception, its permissive character will continue, and no adverse use can arise until there is a distinct and positive assertion of a right hostile to the true owner. *Id.* at 442. Because the McPhersons’ use of the westerly ½ of Outlot C was permissive, and not hostile to the rights of the true owner, plaintiffs simply cannot rely on the McPhersons’ period of use to establish the requisite hostile and adverse use for the statutory 15-year period. *Id.*; *Plymouth Canton Community Crier*, 242 Mich App at 679. Even viewing the evidence in a light most favorable to plaintiffs, I conclude that the trial court properly granted summary disposition in favor of defendants with respect to the prescriptive easement claim.

For these reasons, I would affirm the rulings of trial court in full.

/s/ Kathleen Jansen